

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF MAINE**

**COMMERCIAL UNION INSURANCE )**  
**COMPANY, )**

***Plaintiff* )**

**v. )**

***Civil No. 96-87-B***

**MICHAEL G. DAVIS, )**

***Defendant* )**

**RECOMMENDED DECISION ON PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT**

In this declaratory judgment action, the plaintiff, Commercial Union Insurance Company (“Commercial Union”), seeks construction of a commercial general liability policy issued to the defendant, Michael G. Davis, and Carl Vainio, d/b/a Kennedy Slate Mine & Forestry, in light of allegations raised by Judy and Carl Lucas in an action brought by them in the Maine Superior Court. The Lucases have been granted leave to intervene in this action. Before the court now is the plaintiff’s motion for summary judgment. For the reasons set forth below, I recommend that the motion be granted.

**I. Summary Judgment Standards**

Summary judgment is appropriate only if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter

of law.” Fed. R. Civ. P. 56(c). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party’s case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining if this burden is met, the court must view the record in the light most favorable to the nonmoving party and “give that party the benefit of all reasonable inferences to be drawn in its favor.” *Ortega-Rosario v. Alvarado-Ortiz*, 917 F.2d 71, 73 (1st Cir. 1990) (citation omitted). “Once the movant has presented probative evidence establishing its entitlement to judgment, the party opposing the motion must set forth specific facts demonstrating that there is a material and genuine issue for trial.” *Id.* at 73 (citations omitted); Fed. R. Civ. P. 56(e); Local Rule 19(b)(2). A fact is “material” if it may affect the outcome of the case; a dispute is “genuine” only if trial is necessary to resolve evidentiary disagreement. *Ortega-Rosario*, 917 F.2d at 73.

## **II. Facts and Procedural History**

The summary judgment record reveals the following undisputed facts. Davis and the Lucases entered into an undated written contract entitled “License to Cut and Remove Timber” (the “contract”), a copy of which is attached to defendant’s Statement of Undisputed Material Facts (“Defendant’s SMF”) (Docket No. 15) as part of Exhibit 1. The document concerned the cutting of wood on 120 acres of land located in Norridgewock, Maine owned by Judy Lucas. *Id.*; Amended Complaint, Exh. 1 to plaintiff’s Statement of Undisputed Material Facts (Plaintiff’s SMF”) (Docket No. 9), at ¶ 2. On November 2, 1995 the Lucases brought suit against Davis in the Maine Superior Court (Somerset County) alleging breach of contract, conversion, fraud and timber trespass, a violation of 14 M.R.S.A. § 7552. *Id.* The complaint was amended on November 13, 1995 to add a count for negligence. Second Amended Complaint, Exh. 2 to Plaintiff’s SMF.

The contract allowed Davis to cut softwood eight inches or more in diameter and certain smaller softwood. Contract at ¶ 1. The Lucases allege that Davis's employees cut more wood from the property than the contract permitted. Amended Complaint at ¶¶ 7, 8, 17; Second Amended Complaint at ¶ 21.

Davis is a named insured in Commercial Union's policy number M M R485985. Affidavit of Donald Vickery ("Vickery Affidavit") (Exh. 3 to Plaintiff's SMF) ¶ 2 & Exh. 1 thereto (the "policy"). This policy, a commercial general liability policy, was in effect at the time of the alleged unauthorized wood cutting. *Id.* Commercial Union provided Davis with a defense in the state court action brought by the Lucases, but later informed him that it declined coverage under the policy. Vickery Affidavit at ¶¶ 4, 6. Commercial Union brought this action on March 25, 1996 seeking a declaration that it has no duty under the policy to defend or indemnify Davis in the underlying action. Complaint (Docket No. 1) at 5-6.

The Lucases were granted leave to intervene in this action on May 21, 1996. Docket No. 5. Commercial Union filed its motion for summary judgment shortly thereafter, and Davis and the Lucases duly filed objections.<sup>1</sup> Docket Nos. 8, 11, 14.

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<sup>1</sup> Both Davis and Commercial Union have filed motions to strike the intervenors' Concise Statement of Material Facts (Docket No. 12) for failure to comply with Fed. R. Civ. P. 56 (c) & (e) and Local Rule 19(b). Docket Nos. 17 & 20. The intervenors' Statement of Material Facts contains no citations to the summary judgment record, in violation of the local rule. In response to the motions to strike, the intervenors filed copies of affidavits apparently filed in the underlying state court action. The paragraphs in these affidavits are unnumbered, and no attempt has been made to tie the affidavits to the factual assertions in the intervenors' Statement. Contrary to the requirements of Rule 56(e), the affidavits are replete with hearsay. I deny the motions to strike because the intervenors' Statement includes one paragraph with an appropriate, although inaccurate, citation to the record and one paragraph stating agreement with certain paragraphs in the Plaintiff's SMF. Beyond those two paragraphs, however, I give no consideration to the intervenors' Statement in my recommended decision on the pending motion for summary judgment.

### III. Legal Analysis

In this action based upon diversity jurisdiction, this court applies Maine law. *See State Farm Mut. Auto. Ins. Co. v. Lucca*, 838 F. Supp. 670, 671 (D. Me. 1993). An extended line of Maine cases holds that a court asked in a declaratory judgment action to construe an insurance policy that may cover the defendant in an underlying action must limit its review to the duty of the insurer to defend its insured in the underlying action, and that that determination must be based solely upon a comparison of the allegations in the complaint in the underlying action and the terms of the policy. *E.g., Travelers Indem. Co. v. Dingwell*, 414 A.2d 220, 227 (Me. 1980). “In order for the duty of defense to arise, the underlying complaint need only show, through general allegations, a possibility that the liability claim falls within the insurance coverage. *Union Mut. Fire Ins. Co. v. Inhabitants of the Town of Topsham*, 441 A.2d 1012, 1015 (Me. 1982). If the insurer must defend its insured under this comparison test, it must defend “regardless of the actual facts or the ultimate grounds on which [the insured’s] liability to the injured parties may be predicated.” *American Policyholders’ Ins. Co. v. Cumberland Cold Storage Co.*, 373 A.2d 247, 249 (Me. 1977).

Thus, the comparison test may require the insurer to defend when there may be no ultimate duty to indemnify. *Maine Bonding & Casualty Co. v. Douglas Dynamics, Inc.*, 594 A.2d 1079, 1080 (Me. 1991). “Wise use of judicial resources dictates that an insurer may not litigate its duty to indemnify until the insured has had a chance to defend against any liability.” *State Mut. Ins. Co. v. Bragg*, 589 A.2d 35, 36 (Me. 1991). The comparison test is based solely “on the facts as *alleged* rather than on the facts as they actually are.” *Merrimack Mut. Fire Ins. Co. v. Brennan*, 534 A.2d 353, 354 (Me. 1987) (emphasis in original; citation omitted). “Even when evidence could conclusively establish the absence of a duty to indemnify, ordinarily that evidence is irrelevant to the

determination of the duty to defend.” *Northern Sec. Ins. Co. v. Dolley*, 669 A.2d 1320, 1323 (Me. 1996).

Here, the parties have largely ignored the issue of the duty to defend, preferring to address coverage exclusions found in the policy in relation to indemnification. However, Davis has not waived the duty-to-defend issue, even though he has briefed the duty to indemnify under the policy in response to Commercial Union’s motion. *See United States Fidelity & Guar. Co. v. Rosso*, 521 A.2d 301, 303 (Me. 1987) (insured who goes to trial on indemnity issue without seeking preliminary determination of duty to defend may be deemed to have waived right to that determination); *American Policyholders’ Ins. Co. v. Kyes*, 483 A.2d 337, 340 (Me. 1984) (same). The Law Court has recognized two exceptions to the exclusion of consideration of duty to indemnify from declaratory judgment actions brought before resolution of the underlying action: (1) intentional acts established by previous court action, *Perreault v. Maine Bonding & Casualty Co.*, 568 A.2d 1100, 1101 (Me. 1990), and (2) extrinsic facts rendering the policy void, *American Home Assurance Co. v. Ingenieri*, 479 A.2d 897, 899 (Me. 1984). Neither exception is applicable here.

Commercial Union contends that exclusions j(5), j(6) and m of the policy each preclude coverage for any of the claims raised in the amended and second amended complaints in the underlying action. These exclusions are standardized throughout the insurance industry. *Massachusetts Bay Ins. Co. v. Ferraiolo Const. Co.*, 584 A.2d 608, 609 (Me. 1990). Exclusions j(5) and j(6) have been found by the Law Court to be unambiguous. *Maine Drilling & Blasting, Inc. v. Insurance Co. of North America*, 665 A.2d 671, 675 (Me. 1995). Construction of unambiguous language in an insurance contract is a matter of law for the court. *Banker’s Life Ins. Co. v. Eaton*, 430 A.2d 833, 834 (Me. 1981).

The parties agree that the policy at issue provides coverage for occurrence-of-harm risks but not for business risks, which are the subject of exclusions j(5) and j(6).

An “occurrence of harm risk” is a risk that a person or property other than the product itself will be damaged through the fault of the contractor. A “business risk” is a risk that the contractor will not do his job competently, and thus will be obligated to replace or repair his faulty work.

*Peerless Ins. Co. v. Brennon*, 564 A.2d 383, 386 (Me. 1989) (quoting Note, *Baybutt Construction Corp. v. Commercial Union Insurance Co.: A Question of Ambiguity in Comprehensive General Liability Insurance Policies*, 36 Maine L.Rev. 179, 182 (1984)). While it is perhaps technically impossible to “repair or replace” a tree that should not have been cut down, it is also true that the work of Davis’s employees on the Lucas property was not, strictly speaking, a “product.” The comparison of the complaint and the policy language in this case thus will focus on that language rather than the Law Court’s choice of words to define the risks involved.

Exclusion j provides, in relevant part:

**2. Exclusions**

This insurance does not apply to:

\* \* \*

**j. Damage to property**

“Property damage” to:

\* \* \*

(5) That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the “property damage” arises out of those operations; or

(6) That particular part of any property that must be restored, repaired or replaced because “your work” was incorrectly performed on it.

Policy, Section I, Coverage A, § 2. The policy defines “property damage” as “physical injury to tangible property” or “loss of use of tangible property that is not physically injured,” *id.* Section V, § 15, and “your work” as “work or operations performed by you or on your behalf,” *id.* § 19.

The amended complaint in the underlying action alleges breach of contract, conversion, fraud in the inducement to contract, statutory timber trespass, and negligence. The negligence is described as “failure to properly implement the contract and . . . to supervise his employees, agents, and subcontractees.” Second Amended Complaint, ¶22. The damages sought are the statutory damages available under 14 M.R.S.A. § 7552(3) - (5), except on the fraud count; and restitution, punitive damages, and imposition of a constructive trust on the fraud count. The parties do not dispute that there is no coverage under the policy for intentional acts. Policy, Section I, Coverage A, § 2(a). Each of the counts in the complaint clearly seeks to recover for property damage.

Davis seeks to bring the Lucas’s claims against him beyond the scope of the business risks exclusions by arguing that the trees allegedly wrongly cut were not property lawfully occupied by Davis and that Davis never had permission to perform work on those trees, so that he did not perform any work “on” that property, making exclusions j(5) and (6) inapplicable. Under this interpretation, each individual tree is to be considered as the “real property”<sup>2</sup> to which the exclusions apply. Davis thus was a trespasser as to each tree incorrectly harvested and performed no work “incorrectly” on such trees, because he was not entitled to perform any work at all on them. “The Lucases do not seek damages for work improperly performed in the sense that what was done by Davis was done poorly, the Lucases complain of harm done to property that Davis had no license to disturb.” Defendant’s Opposition to [Plaintiff’s] Motion for Summary Judgment (Docket No. 14) at 4. Davis

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<sup>2</sup> Under 33 M.R.S.A. § 151 “[d]own trees lying on land at the time of conveyance are real estate and pass by the deed; but such down trees as are cut into wood, logs or other lumber and hemlock bark peeled are personal property.” At least until they were cut down, therefore, the trees at issue were part of the real property belonging to Judy Lucas. *Emerson v. Shores*, 95 Me. 237, 239 (1901). This definition does not resolve the issue before the court, but it is difficult to conceive of a deed passing title to a single tree, which must be possible if each tree is a separate parcel of real estate, as Davis argues.

bases this argument on the following language from *Ferraiolo*: “We read [language similar to that of exclusion j(5)] to exclude from coverage only damage to property lawfully occupied by the insured.” 584 A.2d at 611. This is a slender reed indeed.

Even if a logging contractor could “occupy” a single tree, the argument goes too far. The contract itself makes clear that the property which is the subject of the agreement between the Lucases and Davis is “the parcel of land in Norridgewock, Maine Being the same Property Deeded Book 1240 Page 324 in Somerset Registry of Deeds Containing 120 AC. More or Less,” Contract at 1, and that what is conveyed is a license to enter that property and cutting rights to certain softwood on the property, *id.* Davis was thus able to “lawfully occupy” the entire parcel.

Davis relies on *Ferraiolo* for an additional purpose, arguing by analogy that he committed a trespass each time his employees cut down a tree that was not within the cutting rights set forth in the agreement. In *Ferraiolo* the Law Court addressed an insurance coverage issue where the neighbors of the insured claimed in the underlying action that the insured had committed common-law trespass by operation of a gravel pit on its own property; the nature of the trespass is not specified. 584 A.2d at 609. The Law Court construed, in *dicta*, policy language similar to that in exclusion j(5) as inapplicable in that case, where the damage alleged was to property which the insured was not legally entitled to occupy. *Id.* at 611. That is not the case here. Davis is not alleged to have cut trees from property other than the Lucas parcel.

Davis also asserts that language in *Maine Drilling* supports his position. The Law Court was asked on certification from the First Circuit Court of Appeals to determine whether an endorsement not present in the policy at issue here interacted with exclusions j(5) and j(6) in a manner that created an ambiguity in the policy. 665 A.2d at 672. In discussing this issue, the Law Court stated that,

when read together with the endorsement at issue, “[s]ubsections (j)(5) and (j)(6) serve to limit the coverage to that property damage occurring to property other than that on which the insured *is to* perform its work.” *Id.* at 675 (emphasis added). Again, Davis argues that the trees wrongfully cut were not property on which he was to perform his work. And again, his focus is unduly narrow. The trees on the Lucas property were part of the property on which he was to perform his work under the agreement, which was the entire Lucas parcel.

This conclusion is reinforced by the fact that the dissent in *Maine Drilling*, in which the insured was alleged in the underlying action to have blasted more ledge than called for in a contract, adopted Davis’s position.

Because Brox’s claim against Maine Drilling is beyond the scope of the parties’ contractual expectations and is for damages to property other than the product itself caused by alleged deficiencies in Maine Drilling’s performance, exclusions (j)(5) and (j)(6) are not applicable, and the sole issue becomes whether Maine Drilling has insurance coverage for an occurrence of harm risk.

*Id.* at 676. This interpretation was rejected by the majority of the court and therefore cannot be considered to be Maine law which this court is bound to apply in this case.

While Commercial Union has not offered authority directly on point with the factual situation presented in this case, and my research has found none, other courts have come to conclusions that are helpful by analogy. In *Goldsberry Operating Co. v. Cassity, Inc.*, 367 So.2d 133 (La. App. 1979), policy language similar to that of exclusion j(5) was held applicable against an argument that damage caused at 6,900 feet of a well was not damage to the “particular property” upon which the insured was to work when the insured was supposed to perforate the well at a depth of 8,000 feet. The court held that “the particular part of the property upon which Cassity was performing its

operations was the entire part of the well where the gun and line traversed and through which the electricity would have passed to detonate the gun if the gun had reached the desired depth, and for this reason, the exclusion in the insurance policy precludes coverage.” 367 So.2d at 135. In *LISN, Inc. v. Commercial Union Ins. Co.*, 615 N.E.2d 650 (Ohio App. 1992), the insured was removing obsolete cable under contract with NYNEX when an employee inadvertently cut a functioning cable. The court held that exclusion j(6) was applicable; when LISN cut cable that it was not supposed to cut under the applicable contract, its “work was incorrectly performed and the damage done to the functioning cable was excluded under the plain and unambiguous provisions” of the insurance policy. 615 N.E.2d at 654. *See also Continental Graphic Serv., Inc. v. Continental Cas. Co.*, 681 F.2d 743, 744 (11th Cir. 1982) (exclusions relate to entire printing press, not just defective gear that caused damage); *Jet Line Serv., Inc. v. American Employers Ins. Co.*, 537 N.E.2d 107, 111 (Mass. 1989) (exclusion applies to entire tank on which operations were being performed, not just bottom of tank where employees were working at time of damage). I find this authority to be persuasive.

The fact that Count V of the amended complaint sounds in tort, alleging negligence resulting in the same damages alleged in Counts I, II, and IV, does not require a separate analysis or a different result as to that count. Although cast in different legal terms, Count V seeks damages for economic loss to a contracting party sustained due to allegedly defective work by the insured. Count V does not fit within the covered risk that “the work product of the insured, once completed, would cause bodily injury or damage to property other than to the product or completed work itself,” *George A. Fuller Co. v. United States Fidelity & Guar. Co.*, 613 N.Y.S. 2d 152, 156 (1994) (quoting *Zandri Constr. Co. v. Firemen’s Ins. Co.*, 440 N.Y.S.2d 353 (1981)), and thus may not be treated differently for the purposes of an analysis of coverage under the j(5) and j(6) exclusions. 613 N.Y.S.2d at 155

(allegation of negligent supervision of contract work).

Under no reasonable interpretation of exclusions j(5) and j(6) could the Lucases' claims as set forth in their amended complaint be construed to be covered by Commercial Union's policy. Therefore, Commercial Union has no duty to defend Davis in the underlying action, and it is entitled to summary judgment in this declaratory judgment action.

#### **IV. Conclusion**

For the foregoing reasons, I recommend that the plaintiff's motion for summary judgment be **GRANTED**.

#### **NOTICE**

*A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.*

*Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.*

*Dated at Portland, Maine this 21st day of January, 1997.*

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*David M. Cohen  
United States Magistrate Judge*